No. 80-795

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ALEXANDER L. STEVAS,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HEFFRON,

Petitioner,

—v.—

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS,

Respondent.

On Writ of Certiorari To The Supreme Court of Minnesota

BRIEF OF AMICUS CURIAE

(INDIA CULTURAL SOCIETY OF NEW JERSEY et al)

ON BEHALF OF RESPONDENT

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INTEREST OF THE AMICAE CURIAE

Amicae Curiae for this brief are the India Cultural Society of New Jersey, the Gujurati Mandel, and the India Association of Greater Hartford. The 2400 members of the above organizations are Indian Americans of the Hindu faith who support the efforts of the International Society for Krishna Consciousness to bring India's great wealth of knowledge to the people of the West. If Rule 6.05's "booth regulation" is allowed to inhibit ISKCON's distribution of the Bhagavad Gita and other Vedic literatures, Westerners will continue to misunderstand India's great spiritual tradition to the detriment of all Indians, particularly those in America.

In addition, members of the above organizations may sometimes desire to distribute these books themselves, and the "booth rule" would deny them the chance to effectively do so.

Because the position and legal arguments presented in this brief are not the same as those in the Respondent's brief, Amicae respectfully request the Court to allow them time for oral argument.

ARGUMENT

I.

WHAT IS ISKCON?

In 1965, at the age of sixty-nine, A.C. Bhaktivedanta Swami Prabhupada sailed from India to Boston with only fifty rupees (seven dollars) (Encylclopaedia Britannica Book of the Year for 1975). Although his attempts were fraught with many difficulties (See generally: Goswami, Planting the Seed, 1980), by 1977 when he passed on in Vrindaban, India, he had established 108 temples on six continents, authored 71 books (102,375,621 distributed, excluding magazines) and his work had been appreciated and eulogized by scholars and religionists throughout the world.

Srila Prabhupada was thirty-second in the spiritual succession of the Gaudiya Vaishnavas which includes Chaitanya Mahaprabhu, the great reformer of

fifteenth century India (Encyclopaedia Britannica). Srila Prabhupada's teachings embodied India's ancient tradition of Vaishnavism (devotion to Krishna or God) and were thoroughly grounded in the five thousand year old classical Vedic scriptures such as Bhagavad-gita, and the Srimad Bhagavatam (Id.). He uncompromisingly taught his disciples the traditional Vaishnava lifestyle including the strict abstention from sex outside of marriage, meat eating, gambling, and all forms of intoxication.

Srila Prabhupada's message was both simple and profound:

> This very important Krishna consciousness movement is meant to save human society from spiritual death. At present human society is [missing] the aim and objective of human life, which is self realization and reestablishment of our lost relationship with the Supreme Personality of Godhead. The Krishna

> consciousness movement is trying to enlighten human society in this important matter. Bhaktivedanta Swami, The Science of Self Realization, 2 (1977).

In 1966, Srila Prabhupada founded the first branch of the International Society for Krishna Consciousness for the purpose of fostering spiritual realization among its members and propagaing the principles of the Vedic scriptures to the people in general (Goswami, Planting the Seed, 132-33 1980). Both these ends are served by the process of book distribution, which is the very heart of ISKCON's modern mission.

One of ISKCON's most widely distributed books, the Bhagavad-gita, teaches that spiritual realization and self fulfillment are achieved through devotional service to God ("Intelligent persons who are endeavoring for liberation from old age and death take refuge in Me in devotional service.") (Id., 7.30) It is

further described that the highest and most effective means of service is to preach and distribute the message of the Gita to others: ("For anyone who explains this supreme secret to the devotees, devotional service is guaranteed and at the end he will come back to Me. There is no servant in this world more dear to Me than he, nor will there ever be one more dear." Id., 18.68-69). Therefore, the mainstay of an ISKCON member's spiritual advancement is his personal participation in efforts to propagate Krishna consciousness. In ISKCON's early days this principle manifested in the street chanting parties and distribution of sanctified foodstuffs familiar in all American cities. As fast as Srila Probhupada finished translating books from the original Sanskrit and Bengali texts however they were published and distributed by his disciples and followers

as their principle mission. Since Macmillan Company first published the Bhagavad-gita As It Is in English in 1968, Srila Prabhupada's books have been distributed in thirty-six languages, including Russian, Chinese and Hebrew. He taught that the most effective means of propagating Krishna consciousness was through book distribution. As expressed in 1935 by his spiritual predecessor Srila Bhaktisiddhanta, "It would be better to take the marble from the temple walls to secure money ... to print books." Goswami, A Lifetime in Preparation, 91 (1980). Therefore, Srila Prabhupada himself wrote, "One should engage in practical service to the Lord. In our Krishna consciousness movement all our activities are concentrated upon distribution of Krishna literature." (Srimad Bhagavatam, 10.2.37 purport).

In addition to developing personal

spiritual faith and realization, book distribution is the method for recruiting new members for the society. The often hurried pace of life in the public places or forums of modern America does not always lend itself to the thoughtful, open-minded consideration that is required to understand the philosophy of Krishna consciousness. But, a book may be tucked under the arm to be digested at a later more opportune time, often in the quiet and privacy of the home.

Although ISKCON members do not expect large segments of the American public to join their ranks in the immediate future, they do hope to make a significant contribution to American culture by their book distribution. Indeed, they see the principles contained in the Bhagavad-gita as intensely relevant to the problems faced by modern society.

With the progression of the age of Kali (the present age) people are becoming very proud, and attached to women and intoxication. All these habits, or so-called advancement of civilization, are the root cause of all irreligiosities, and, therefore, it is not possible to check crime, corruption, bribery, nepotism, etc. Man cannot check all these evils simply by statutory acts and police vigilance, but he can cure the disease of the mind by the proper medicine, namely advocating the principles of brahminical culture, i.e., austerity, cleanliness, truthfulness, and mercy. Modern civilization and economic development are creating a new situation of poverty and scarcity. If the leaders and rich men of society spend fifty percent of the accumulated wealth mercifully for the misled mass of people and educate them in God consciousness, certainly the age of Kali (quarrel) will be defeated in its attempt to entrap the conditioned souls. We must always remember that false pride, or too high an estimation of one's own value, undue attachment to women, and intoxication will

> divert human civilization from the path of peace in the world. The preaching of the Bhagavatam principles will automatically render all men austere, clean both inside and outside, merciful to the suffering, and truthful in daily behavior. That is the way of correcting the flaws of human society, which are very prominently exhibited at the present moment. (Srimad Bhagavatam 1.17.24 purport).

Book distribution provides the spiritual inspiration and the method of propagation of the International Society for Krishna Consciousness. To suppress it, therefore, as does the Minnesota statute, severely frustrates the legitimate missionary efforts of ISKCON and thus circumvents the protection that such activities are afforded under the First Amendment.

II

RULE 6.05 UNDERMINES THE FUNDAMENTAL VALUES OF THE FIRST AMENDMENT

A core concept of First Amendment protections is that "[s]peech is often provocative and challenging," and "may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." Terminiello v. Chicago, 337 U.S. 1, 4 (1949). In the last decade, an influx of new religious movements has resulted in a classic ideological struggle between traditional values and beliefs of a resistant Judeo-Christian society, and new ideas pressing for acceptance.[1] The

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[1] A.L. Basham, a leading authority on India and its religions, recently stated that the ISKCON movement has spread to the West without significantly diluting its Eastern heritage. "Here, for the first time since the days of the Roman Empire, an Asian religion new to the West is being practiced openly in the streets of the great cities of the Western world by people

authors of the First Amendment, however, "knew, that unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." Martin v. Struthers, 319 U.S. 141, 143 (1943).

The problem of maintaining a meaningful system of freedom of expression is one of the most complex and important that any society has to face. T. Emerson, Toward A Theory Of The First Amendment, 19 (1966). In this respect, Rule 6.05 is more than a simple time, place and manner regulation. To the contrary, the Minnesota "booth rule" represents the most serious challenge to religious freedom since the variety of restraints imposed

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of Western and Judeo-Christian background." Los Angeles Times, Feb. 15, 1981, 1 at col. 1.

upon the Jehovah's witnesses in the 1930's and 1940's. Indeed, the "booth rule" strikes at the heart of ISKCON's religious expression, and threatens its very existence. As aptly stated by Justice Douglas, "The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found." Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

In order to protect against this, the First Amendment has traditionally occupied a "preferred" position in the American system of free expression. Marsh v. Alabama, 326 U.S. 501, 509 (1946). As the foundation of democratic society, it provides the milieu in which individual liberties may be exercised. Additionally, it represents the major distinction between free societies such as ours and

well-known totalitarian regimes that seek to suppress individual liberties and religious expression to remote times, obscure places, and ineffectual methods.

"The Free Exercise Clause ... withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." Abbington School District v. Schemmp, 374 U.S. 203, 222-23 (1963).

Rule 6.05 is a violation of the Free Exercise Clause of the First Amendment. Restricting ISKCON's legitimate missionary activities to a booth is an unacceptable interference with ISKCON's ability to adequately express its religious views through the dissemination of religious literature.

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as safe haven for crackpots. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513 (1969).

ISKCON's activities are intimately connected to the core values underlying the First Amendment and must be protected. As noted by Professor Cox, "Liberty of Expression benefits more than the speaker. The hearer and reader suffer a violation of their spiritual liberty if they are denied access to the ideas of others. When first considered, freedom of speech and press chiefly meant the opportunity to hear and read the word of God and thus to discover the road to salvation." Cox, Foreward: Freedom of Expression in the Burger Court,

94 Har. L. Rev. 1 (1980).

The First Amendment was designed to secure "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality." Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965). By distributing religious and philosophical literature to receptive persons, ISKCON's activities are promoting this essential purpose by assisting these persons in the formulation and development of their beliefs, opinions, and personalities. The "booth rule," however, frustrates this purpose by restricting the public's access to ISKCON's stock of ideas and beliefs, and thus "invades the sphere of intellectual spirit which it is the purpose of the First Amendment to our Constitution to reserve from official control." West Virginia State Board of Education v. Barnette, 319

U.S. 624, 642 (1943).

Without the right to express one's views and beliefs, the right to formulate them is of little value. Indeed, it is impossible to separate formulation from expression, as expression is an integrated part of the development of ideas, of mental exploration, and of affirmation and realization of the self. What Milton said of licensing the press is thus equally true of the Minnesota rule: it is "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." Milton, Areopagitica--A Speech for the Liberty of Unlicensed Printing (1644).

The "booth rule" also prevents ISKCON's teachings and beliefs from reaching the "market place of ideas." Human judgment is extremely delicate. In the course of the decisionmaking process, it may be easily detracted by emotion, prejudice, or

personal interest. Indeed, freedom of inquiry and liberty of expression are essential to this process, for only through endless competition and debate can error be exposed, truth emerge, and progress be made.

The rule affording the widest possible latitude in promoting the core values underlying the First Amendment should be adopted by the Court. As stated by Justice Murphy, "Repression has no place in this country. It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought." Martin, 319 U.S. at 150 (Murphy, J., concurring).

The crucial question this Court must ask then, is "whether or not there has been

a real abridgement of speech" and religion. Kovacs v. Cooper, 336 U.S. 77, 85 (1949). Although First Amendment rights, even when religiously based, "do not free individuals from the responsibility to conduct themselves obediently to laws which are imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity," Barnette, 319 U.S. at 643-44 (Black and Douglas, J.J., concurring), "in every case the power to regulate must be so exercised as not, in attaining a permissable end, unduly to infringe the protected freedom." Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

Rule 6.05, however, clearly violates this principle by substantially abridging ISKCON's ability to disseminate its religious literature throughout the public,

non-rented portions of the fairgrounds. By allowing speech but not the distribution of literature or solicitation of funds, it attempts to regulate the "extent," or content of ISKCON's religious expression. Unlike the decibel restriction upheld in Kovacs, which limited the manner of operating a sound truck, the area limitations placed upon ISKCON restrict the extent of the reasonable use of a protected means of communication. By saying that ISKCON's activities cannot extend beyond the reasonably limited confines of a booth, Rule 6.05 constitutes not only a time, place, and manner regulation, but a direct "quantitative restriction on religious communication and association."

The "booth rule," therefore, is not a regulation, but a restriction which interferes with protected freedoms. Although "[a]ll regulatory enactments are

prohibitory as far as their restrictions are concerned," Kovacs, 336 U.S. at 85, Rule 6.05's exploitation of this regulative "loophole" makes it inherently dangerous to the future exercise of First Amendment rights. Indeed,

> [a] system of free expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest basis for exceptions. And any such exceptions must be clear cut, precise and readily controlled. Otherwise the forces that press toward restriction will break through the openings, and freedom of expression will become the exception and suppression the rule. Emerson, supra, at 19.

III

RULE 6.05 APPLIES AN ERRONEOUS "SPEECH-CONDUCT" STANDARD TO THE VARIOUS ASPECTS OF ISKCON'S MISSIONARY ACTIVITIES, AND IS THEREFORE UNCONSTITUTIONAL

A. Rule 6.05 is a "Green River" Ordinance Erroneously Applied to Book Distribution And The Solicitation of Funds.

By attempting to apply a "Green River" type ordinance, originally designed to regulate commercial peddlers, hawkers, and solicitors, to the distribution and solicitation of religious literature, Rule 6.05 makes an impermissable "speech-conduct" distinction foreclosed by decisions of this Court. Indeed, "[a]lthough a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." Schneider v.

State, 308 U.S. 147, 160 (1939).

While a city may thus prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct, Coates v. Cincinnatti, 402 U.S. 611, 614 (1971), it may only do so "through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." Id. (emphasis added)

Rule 6.05, however, by prohibiting members of ISKCON from distributing their religious literature and receiving contributions throughout the public, non-rented portions of the fairgrounds is aimed specifically at protected speech and religion, rather than at the legitimate interests of the State in regulating ordinary commercial activities or other forms of "antisocial behavior."

B. Book Distribution Is Expression

Moreover, by distinguishing between the distribution of religious literature and oral speech, the Rule creates an impermissable distinction between two equally protected forms of expression.

In Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939), Justice Roberts declared that the right to peaceably assemble for the purpose of expressing one's views, "whether orally or in writing, is a privilege inherent in citizenship of the United States, which the Fourteenth Amendment protects." Id. at 512 (emphasis added). In Lovelle v. Griffin, 303 U.S. 444 (1938), Chief Justice Hughes stated that "Liberty of circulation is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." id. at 452 quoting Ex parte

Jackson, 96 U.S. 727, 733 (1878).

The right to distribute all forms of religious literature has been vigorously upheld by this Court. Indeed, its distribution may not be prohibited on the streets, Jamison v. Texas, 318 U.S. 413, 416 (1943), or from door to door. Martin, supra. It may not be conditioned upon the granting of a license which is subject to the unfettered discretion of municipal officials, Largent v. Texas, 318 U.S. 418, 422 (1943); Tucker v. Texas, 326 U.S. 517, 519-20 (1946); Hynes v. Mayor of Oradell, 425 U.S. 610, 622 (1976), or upon the payment of a license tax for the privilege of doing so. Murdock, supra; Follette v. Town of McCormick, 321 U.S. 573 (1944). Indeed, the hand to hand distribution of religious literature as practiced by ISKCON is:

> more than preaching; it is more than distribution of religious literature. It is a combination of both.

> Its purpose is an evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the church and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press. Murdock, 319 U.S. at 109.

Rule 6.05, therefore, makes an unconstitutional distinction between oral communication of religious ideas, and written communication of religious ideas. By allowing members of ISKCON to prosyltize throughout the non-rented, public portion of the Fair, but not to distribute their literature except from the confines of a booth, Rule 6.05 categorizes literature distribution as the type of symbolic conduct discussed in Cox v. Louisiana, 379 U.S. 536, 554

(1965). In Cox, however, the Court explicitly contrasted picketing and parading with a newspaper comment and a telegram by a citizen to a public official. The parading and picketing activities were said to constitute conduct "intertwined with expression and association," while the newspaper comment and telegram were described as a "pure form of expression" involving "free speech alone" rather than "expression mixed with particular conduct." Id. at 563-64.

The distribution of religious literature, therefore, is not symbolic conduct. To the contrary, it is "speech pure" in written form. By applying one standard of protection to oral communication, and another standard to written communication, Rule 6.05 creates an unconstitutional distinction between two equally protected forms of expression.

This proposition was recently affirmed with respect to a "belief-conduct" distinction in Wisconsin v. Yoder, 406 U.S. 205 (1972). In rejecting the State's assertion that certain educational practices of the Amish were outside the protection of the First Amendment, the Court stated that while "[i]t is true that activities of individuals, even when religiously based, are often subject to regulation by the States ... there are some areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." Id. at 220.

C. The Collection of Funds in Conjunction With the Distribution Of Religious Literature Is Also Fully Protected By the First Amendment.

Nor is the solicitation of contributions in conjunction with distribution entitled to any less

protection than speech and writing. To the contrary, this issue is directly controlled by Murdock. As in Murdock, the Krishnas take literally the Sanskrit command of their scriptures - "Yāre dekha, tāre kaha 'krsna-upadeśa/āmāra ajnāya guru hana tāra ei deśa: Instruct everyone to follow the orders of Lord Krishna as they are given in the Bhagavad-gita and Srimad Bhagawatam ... and in this way try to liberate everyone in this land." Chaitanya Charitamrita, Madhya, 7.128.

In addition, the Krishnas have a practice in distributing their literature to request a contribution to cover the cost of the literature and help support the activities of the religion. Rule 6.05, however, attempts to restrict this practice to a small booth in the same way it restricts the sale of hot dogs, balloons, stuffed animals, and frivolous games.

Under no circumstances, however, may the State "prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because they invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." Jamison, 318 U.S. at 417.

The State, however, attempts to classify the donative transaction as a "sale" rather than a "contribution" in order to justify its restriction. But even accepting, arguendo, that this is true, "the mere fact that religious literature is 'sold' rather than 'donated' does not transform evengelism into a commercial enterprise." Murdock, 319 U.S. at 111, and this is true even when applied to a resident preacher who makes his living by the "sale" of religious books.

Follett, 321 U.S. at 576-77. "If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs are not to be guaged by standards governing retailers or wholesalers of books." Murdock, 319 U.S. at 111.

Expression does not lose its First Amendment protection when performed in conjunction with a request for donations. "Prior authorities ... clearly establish that charitable appeals for funds ... involve a variety of speech interests -- communication of information, the dissemination and propagation of views and ideas, and the advocacy of cause -- that are within the protection of the First Amendment." Village of Schaumberg v. Citizens For A Better Environment, 444 U.S. 620, 632 (1980). See also Buckley v.

Valeo, 424 U.S. 1 (1965).

By restricting the amount of funds that ISKCON will thus be able to collect, the "booth rule" will have a substantial impact on the quality of ISKCON's speech and religious freedom. "The distribution of the humblest handbill or leaflet entails printing paper, and circulation costs." Id. at 19. The limitation of the "booth rule," therefore, represents a "substantial rather than merely theoretical restraint... on the quantity and diversity of...speech," and should be rejected. Id. at 20.

IV

RULE 6.05 UNCONSTITUTIONALLY DENIES ACCESS TO SPEECH OPPORTUNITY

A. A speaker's minimum access to a public forum is a guaranteed constitutional right.

The Court in Hague stated that:

> Wherever the title of the streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from the most ancient times, been part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute but relative, and must be exercised in subordination to the general comfort and convenience, and in good consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. Hague,

307 U.S. at 515-516 (emphasis added).

This Court has consistently recognized the public's right to a suitable outlet for the communication of ideas to be a fundamental principle underlying its public forum decisions.[2] See, e.g., Schneider, supra (a municipality may not prohibit the distribution of leaflets on the public streets), Jamison, supra (accepting contributions for religious literature does not alter a colporteur's right of access to public sidewalks), and Martin, supra (striking a general prohibition on door to door canvassing for literature distribution). In Amalgamated Food Employees Local 590 v.

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[2]The Court has held that the public facility sought to be used must not be principally meant for an inconsistent use. See, e.g., Adderley v. Florida, 385 U.S. 39 (1966) and Cox v. Louisiana, supra. The walkways etc. of a public fair are not specialized facilities and, thus, those desiring access in the instant case are, "[not] seeking to use a facility primarily serving a competing use." Southeastern Promotions v. Conrad, 420 U.S. 546, 555 (1975).

Logan Valley Plaza, Inc., 391 U.S. 308 (1968), the Court said, "title to municipal property is, standing alone, an insufficient basis for prohibiting all entry onto such property for the purpose of distributing printed matter." Id. at 316. And, while Logan Valley's allowing picketing on private property is no longer authoritative, its viability as to the public's right of access to more traditional forums remains intact. Thus, by excluding literature distribution from the public areas of the Minnesota Fair, Rule 6.05 effectively denies ISKCON members right of access to an appropriate public forum for the purpose of First Amendment expression and is, therefore, unconstitutional.

B. Exclusion of access to an appropriate public forum is unconstitutional even though it is non-discriminatory.

The Fair's attempt to justify the exclusion of ISKCON's literature

distribution on the grounds that all First Amendment literature distribution is similarly excluded cannot pass constitutional muster. Although any regulation of First Amendment activities must be even-handed and free of content related value judgments, Southeastern Promotions, supra, it does not follow that a total ban on all freedom of expression is permissible. "[T]he Struthers ordinance prohibits door to door canvassing of any kind, no matter what its character and purpose may be, if attended by the distribution of written or printed matter in the form of a circular or pamphlet. I do not believe that this outright prohibition is warranted." (Murphy, J., concurring), Martin, 319 U.S. at 151. If simply by excluding all persons equally, governmental authorities may exclude protected expression from a public forum, soon all public forums will be effectively

closed to meaningful communication, and the open society will exist no longer. See generally, Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 S. Ct. Rev. 1 (1965), and Note, The Public Forum: Minimum Access, Equal Access, and the First Amendment, 28 Stan. L. Rev. 117 (1975).

C. A speaker's chosen channel of communication may not be denied on the grounds that an alternative forum is available.

The alternative forums of booths and speech unconnected with literature distribution are available does not justify the booth regulation. "One is not to have the exercise of his liberty of expression abridged on the plea that it may be exercised in some other place." Schneider, 308 U.S. at 163. "Traditional First Amendment doctrine has long held that the existence of other channels of communication cannot be used as a justification to close

the particular means of expression that the speaker or listener has chosen." Emerson, First Amendment Doctrine and the Burger Court, 68 Calif. L. Rev. 422, 454 (1980).

D. Rule 6.05 denies ISKCON's right to effectively reach an audience.

In Saia v. New York, 334 U.S. 558 (1948), the Court held a municipality could not arbitrarily deny a speaker the right to effectively communicate with an audience through a chosen channel of expression on the plea that a less effective outlet was available. In Kovacs, supra, the Court, although recognizing a municipality's interest in protecting unwilling listeners against unwarranted intrusion,[3] confirmed that a speaker has a right to, "reach the minds of willing listeners and to do so

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[3] In the instant case, there is no question of a captive audience. ISKCON distributors must not continue to solicit persons who have indicated their unwillingness to hear ISKCON's message. Should the distributor do so, he may be prosecuted under a separate ordinance.

there must be an opportunity to win their attention." Id. at 87 (emphasis added). See also Martin, supra (guaranteeing distributors of religious literature right of access to an audience in residential areas). By confining ISKCON literature distribution to a rented booth, Rule 6.05 denies ISKCON members their rightful audience, i.e., those fairgoers willing to listen to their message and accept their literature. To reach such willing persons ISKCON distributors must be allowed to freely canvass and solicit. It is rare indeed for those persons who are the objects of a preaching or communications effort to unilaterally initiate the encounter. And yet, this is the only opportunity available to ISKCON under Rule 6.05. One's freedom of speech should not be limited to the audience of those who decide to approach him. Indeed, for minority and unpopular views, such a

construction of the First Amendment would render its protections illusory.

E. Selling of products and the expression of ideas are not constitutionally equal.

Finally, the State urges that because it may in the interest of public order, require ordinary commercial vendors to sell their wares only from rented booths, the same rule must be applied to ISKCON's rights of First Amendment expression. This position, however, fundamentally confuses the meanings of the First and Fourteenth Amendments. The very purpose of the First Amendment is to elevate certain core rights to a preferred status when coming into conflict with other interests. Nothing in the Constitution guarantees a merchant the right to sell his wares in a public place.

Although this Court applied a limited form of protection to commercial speech in Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976), the

selling of wares by vendors is a commercial transaction and not the commercial expression of fact protected in that case. The literatures distributed by ISKCON members are, however, in themselves ideas or vehicles of religious expression. Surely, such a distinction may be constitutionally recognized in granting different levels of access to an appropriate forum for First Amendment expression.

Rule 6.05's unwarranted blanket prohibition on all literature distribution outside rented booths cannot be justified on the grounds that it is equally applied, and it is, therefore, an unconstitutional denial of the public's right of access to an appropriate First Amendment forum.

V

THE IMPACT OF RULE 6.05 UPON ISKCON'S CONSTITUTIONALLY GUARANTEED RIGHTS OF FREEDOM OF EXPRESSION IS SEVERE

"In every case ... where legislative abridgement of fundamental rights is asserted, the courts should be astute to examine the impact of the challenged legislation." Schneider, supra at 161. "The question in a particular case is whether that governmental control is exerted so as not to deny or unwarrantedly abridge ... the communication of thought and discussion of public questions immemorially associated with resort to public places." Cox v. New Hampshire, 312 U.S. 569 (1941). In the instant case, Rule 6.05 totally frustrates ISKCON's rights of free religious expression by confining literature distribution to a small booth.

Although Rule 6.05 allows speech unaccompanied by distribution throughout the fair, this concession is meaningless

for ISKCON's purposes. ISKCON does not consider the spoken word an effective means for communicating its message, particularly in the context of a state fair. And, this Court has repeatedly recognized that perrogative by protecting the use of the printed word for First Amendment expression. See, e.g., Schneider, supra.

Furthermore, although Rule 6.05's confinement of solicitation to a booth may pose no undue burden upon the fair's commercial vendors, its effects upon ISKCON's religious expression is devastating. The public expects to encounter various games, exhibits, and food stands at the fair and, thus, readily patronizes them. For a member of a misunderstood religious minority, however, the situation is entirely different. His message and demeanor often appear strange and unfamiliar. Social pressure and shyness generally inhibit the public from

talking with him even when they are so inclined. Such obstacles may be overcome by an enthusiastic distributor, but if he is confined to a booth and forbidden to peripetetically canvass, the situation becomes impossible. Many of the fairgoers will never even pass the ISKCON booth and, of those who do, only the most sincere or curious will actually be bold enough to stop. Moreover, the psychological impact of the booth restriction is to severely chill the enthusiasm of ISKCON distributors to communicate their ideas to the public.

> In order to understand the impact of the place restriction, it is necessary to appreciate the nature of that religion. The devotees of this sect of Hinduism carry a duty to perform an evangelical ritual called 'sankirtan.' It consists of spreading the 'truth' and soliciting. It cannot be exercised with any degree of effectiveness from a 30-foot booth - not when the

> fairgrounds sprawl over approximately 250 acres. The inescapable fact is that the impact of the booth restriction upon the protected activities of ISKCON devotees is markedly different from its impact on other commercial vendors. International Society for Krishna Consciousness v. State Fair of Texas, 461 F. Supp. 719, 723 (N.D. Tex. 1978).

The Krishna religion imposes upon its adherants the duty to distribute literature. The Minnesota booth rule renders such distribution practically impossible. Upholding the rule will mean that ISKCON's free expression and religious practice will be virtually extinguished at the Minnesota fair. Furthermore, it is certain that, following such a decision by this Court, similar regulations will be enacted in fairs, airports, and other public forums around the country. This would, in turn, create serious repercussions upon ISKCON's ability to

communicate with the public, its financial solvency, and the morale of its members. A regulatory rule such as 6.05 having such a devastating impact on protected expression is unconstitutional without the showing of a critical governmental interest.

VI

THE MINNESOTA STATE FAIR HAS NOT SUSTAINED ITS BURDEN OF DEMONSTRATING AN OVER-RIDING INTEREST SUFFICIENT TO JUSTIFY RULE 6.05

Rule 6.05 is not the type of reasonable time, place and manner regulation traditionally upheld by this court, but is, rather, an impermissible denial, "in the guise of regulation." Hague, 307 U.S. at 516. Although this Court has consistently allowed a governmental entity to impose reasonable regulations upon First Amendment expression, the Constitutional limit of such regulations has always been very narrowly drawn. Cantwell, 310 U.S. at 305. Indeed, those regulations upheld have been almost exclusively innocuous reguirements of registration and identification which (unlike the Minnesota rule) do not severely impair the protected expression. Thomas v. Collins, 323 U.S. 516, 540-41 (1945). See generally Jones,

Solicitations-Charitable and Religious, 31 Baylor L. Rev. 53, 55-56 (1979). The state Fair is attempting to accomplish by its booth rule that which this Court forbid in Jamison v. Texas, supra, at 417. The "state may not prevent the collection of funds for a religious purpose by unreasonably obstructing or denying their collection." Id. (emphasis added) "Regulatory measures ... no matter how sophisticated, cannot be employed in purpose or in effect to stiffle, penalize, or curb the exercise of First Amendment rights." Louisiana ex. rel. Gremillion v. N.A.A.C.P., 366 U.S. 293, 297 (1961).

Although Minnesota asserts a compelling interest in minimizing congestion, it has been unable to offer any factual evidence to support that claim. Furthermore, considerably less restrictive measures could easily be taken by the fair if it really wanted to minimize congestion.

The Minnesota Fair is encountering no more serious traffic problem than is found during rush hours on any downtown sidewalk in large metropolitan areas of this country where it has been found, "as long as sufficient space is left for the normal flow of pedestrians other uses have very little impact on pedestrian uses." Philadelphia News and Borough Council, 381 F. Supp. 228, 243 (E.D. Pa. 1974).

As for fraud, the government's "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentation can be prohibited and the penal laws used to punish such conduct directly." Village of Schaumburg, 444 U.S. at 637. The state fair contends, however, that these measures are too difficult for it to accomplish administratively.

> Prohibition may be more convenient to the law maker, and easier to fasion than a regulatory measure...But... [f]reedom of religion has a higher dignity under the Constitution than municipal or personal convenience. In these days free men have no loftier responsibility than the preservation of that freedom. A nation dedicated to that ideal will not suffer but will prosper in its observance. (Murphy, J., concurring) Martin, 319 U.S. at 151-152.

VII

RULE 6.05 DISCRIMINATES ON THE BASIS OF CONTENT, AND THUS VIOLATES THE EQUAL PROTECTION CLAUSE

Rule 6.05 is a striking example of majoritarian censorship of minority religious views. Because it impacts disproportionately on the views of minority religions, it represents a content-based restriction rather than a simple regulation of time, place and manner. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the exercise of religion." Yoder, 406 U.S. at 220. See also, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Because the hand distribution of religious literature is "an age-old form of missionary evangelism ... that has been a potent force in various religious movements down through the years," it is

imperative that ISKCON be allowed to distribute its literature throughout the non-rented, public areas of the Fair. Especially at the present time, the increasing concentration of ownership of conventional channels of communication has made it exceedingly difficult for diverse points of view to reach the "market place for ideas." See, e.g., Kovacs, 336 U.S. at 102 (Black, J., dissenting).

Under these circumstances, access to some inexpensive means of effective communication is essential.

> For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general concern is to picket, handbill, or to utilize other free or relatively inexpensive means of communication. The only hope these people have to be able to communicate effectively is to be permitted

> to speak in those areas in which most of their fellow citizens can be found. Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 580-81 (Marshall, J., dissenting).

This proposition is especially true with respect to ISKCON. ISKCON is frequently subjected to critical attacks by both the media and other groups.[4] In the course of a free and open democratic society, such attacks are natural and expected. However, in light of recent decisions by this Court holding that licensed broadcasters are not required to sell editorial time, Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), and that newspapers are not obligated to provide

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[4] See, e.g., Delgado, Religious Totalism: Gentle And Ungentle Persuasion Under The First Amendment, 51 S. Cal. L. Rev. 1 (1977) (advocating the removal and "deprogramming" of members of unpopular minority religions).

reply space to individuals who are attacked or criticized by the press, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the ability of those attacked to effectively defend themselves is significantly reduced.

The hand to hand distribution of religious literature, therefore, is "essential to the poorly financed causes of little people." Martin, 319 U.S. at 146. "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way," Murdock, 319 U.S. at 111, or those "with a long purse." Follette, 321 U.S. at 576.

Moreover, the Fair is particularly appropriate for this activity. "The right of access to places traditionally open to the public ... may be seen as assumed by the amalgam of the First Amendment guarantees of speech and press; and their

affinity to the right of assembly is not without relevance." Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. 2814, 2828 (1980) (emphasis added).

Fairs, of course, have historically been open to the public for a wide variety of purposes. "A fair is almost by definition a congeries of hawkers, vendors of wares and services, and perveyors of ideas, commercial esthetic and intellectual." ISKCON v. State Fair, 461 F. Supp. at 721. Large numbers of people from diverse backgrounds are invited to attend through wide-scale advertising and media announcements. Numerous displays and presentations are designed to educate and inform the public about a variety of subjects which include "agriculture, horticulture, stockbreeding, manufacturers, and the mining, mechanical and industrial arts and sciences." Minn. Stat. §37.15 (1980).

The Fair, therefore, is suitable and compatible with the expression of ISKCON's religious beliefs. Designed and dedicated to a variety of communicative subjects, ISKCON's activities are perfectly compatible with the normal activities of the Fair. See: Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Southeastern Promotions, 420 U.S. at 556.

Moreover, the State has failed to show that any "substantial" or "material" disruption of the Fair will occur by allowing ISKCON to perform the peripatetic distribution of religious literature in the non-rented public portions of the Fair, or that ISKCON's activities will unreasonably impair the value or use of the State's property as a Fair. See: Pruneyard Shopping Center v. Robins, ___ U.S. ___, 100 S. Ct. 2035, 2042 (1980). To the contrary, any disturbance to the Fair caused by ISKCON's activities

will be of no more severity than the disruption caused by a crying child, casual conversation, or idle conversation of food by fairgoers in similar areas of the Fair.

On the other hand, the Fair is of special importance to ISKCON's activities. Large numbers of people from diverse backgrounds constitute a reachable, receptive audience not approachable in other areas, or by door to door visitations. As a result, the chances of ISKCON attracting new members and sympathizers is greatly enhanced by access to the Fair.

Rule 6.05, however, denies ISKCON this fundamental right, and thus discriminates against minority religions who lack access to the conventional channels of communication available to established, well-financed groups and organizations. "Laws which hamper the free use of some instruments of

communication thereby favor competing channels. Thus unless constitutionally prohibited, laws like this ... can give an overwhelming influence to views of owners of legally favored instruments of communication." Kovacs, 336 U.S. at 102 (Black, J., dissenting). Indeed, the vitality of this principle was recently confirmed in a 1978 speech by noted author and dissident Alexander Solzhenitsyn at Harvard University:

> Without any censorship in the West, fashionable trends of thought and ideas are fastidiously separated from those which are not fashionable and the latter, without ever being forbidden, have little chance of finding their way into periodicals or books or be heard in colleges. Your scholars are free in the legal sense, but they are hemmed in by the prevailing fad. Solzhenitsyn. A World Split Apart, Vital Speeches of the Day, 678 (1978).

Rule 6.05, therefore, violates the First and Fourteenth Amendments to the

Constitution by impacting disproportionately against minority religious organizations such as ISKCON. Although financial need, standing alone, does not constitute a suspect class, see, e.g., San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Harris v. McRae, ___ U.S. ___, 100 S. Ct. 2671 (1980), that situation is substantially altered when combined with an affirmative government "obstacle" such as the booth. See Harris, supra, at n.19; Maher v. Roe, 432 U.S. 464, 472 (1977).

In light of this concept, this Court should affirm the basic principles of the First Amendment and Free Expression, by holding that "beliefs ... which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majorities views" will not be tolerated. Sherbert v. Verner, 374 U.S. 398, 411 (1963) (Douglas, J., concurring).

CONCLUSION

It is not unusual for movements of spiritual reform to be unpopular in their beginnings. People always resist fundamental changes in world view, although such is the price of progress in the search for truth. Still, to require that persons with spiritual inspiration wait passively until the public develops the initiative to inquire from them is far too much to ask. Members of ISKCON must be given the full opportunity to effectively communicate their ideas in appropriate public places.

Respectfully submitted,

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